Dato' Saizo Abdul Ghani v Celcom (M) Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S4–23–46 OF 2006
TENGKU MAIMUN J
27 NOVEMBER 2007

Civil Procedure — Pleadings — Statement of claim — Mere reproduction of contents of letters without properly pleading particulars of alleged defamatory letters — Whether statement of claim ought to be struck out

Tort — Defamation — Qualified privilege — Letter was sent to senior management of defendant who had interest to receive the letter — Whether amounted to publication to third party

The plaintiff was a dealer of the first defendant's pre-paid cards and starter packs. Between 16 June 2005 and 15 July 2005 the first defendant organised a contest known as 'X-treme Challenge (Round II) Contest' ('the contest'). The contest was open to all of the first defendant's prepaid dealers and the plaintiff had taken part in the contest. In relation to the contest, the first defendant had issued a pamphlet to all its prepaid dealers including the plaintiff setting out the rules of the contest. Vide a letter dated 21 November 2005 the second defendant on behalf of the first defendant wrote to the plaintiff alleging that there were some abnormalities which involve the stock that the plaintiff's company had purchased from the authorised distributors. The letter was copied to the Chief Operating Officer and the Regional General Manager, Eastern Region (where the plaintiff was based) of the first defendant. By another letter dated 27 December 2005 the second defendant on behalf of the first defendant again wrote to the plaintiff that the plaintiff had contravened the rules of the contest. The plaintiff claimed against the defendant for damages for defamation and breach of contract. In the statement of claim, the plaintiff merely reproduced the contents of the letters without properly pleading the particulars of the alleged defamatory letters. The defendants filed an application to strike out the plaintiff's claim pursuant to O 18 r 19(1)(a) and/or (b) and/or (d) of the Rules of the High Court 1980 and/or pursuant to the inherent jurisdiction. The application was premised inter alia on the ground that: (1) the plaintiff had not pleaded the particulars of the documents that were purportedly defamatory; (2) there was no publication in law and in fact of the excerpts pleaded by the plaintiff from the two letters dated 21 November 2005 and 27 December 2005 ('the letters') as the letters were issued by the second defendant on behalf of the first

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defendant and sent only to the plaintiff; (3) the letters were issued by the second defendant for and on behalf of the first defendant within the scope of the second defendant's usual authority and/or in the ordinary course of the first defendant's business; and (4) although a claim for damages for alleged breach of contract had been prayed for by the plaintiff, the plaintiff had failed to set out any factual or other basis for the relief. The learned deputy registrar dismissed the defendant's application, hence this appeal. Learned counsel for the plaintiff in submitting that this was not a proper case to be dealt with under O 18 r 19 argued, inter alia, that publication had in fact been made to a third party, ie one Abdul Ghani bin Abdul Razak who had attended a briefing regarding the contest on behalf of the plaintiff on 15 June 2005.

Held, allowing the appeal with costs:

Undeniably the letter dated 21 November 2005 was sent to the plaintiff and clearly it could not be said that there had been publication to a third party. There was also no doubt that the defendants who were protected by qualified privilege as the Chief Operating Officer and the Regional Manager of the Eastern Region of the first defendant had a corresponding interest to receive the letter. This was fortified by the fact that the subsequent letter of termination of the plaintiff's dealership was signed by the Chief Operating Officer of the first defendant. In respect of defamation, the plaintiff's claim against the defendant was frivolous, vexatious and an abuse of the process of the court. Further, the plaintiff had not set out any facts which formed the basis of the alleged breach of contract (see para 14).

[Bahasa Malaysia summary

Plaintif adalah wakil penjual kad prabayar dan pek permulaan defendan pertama. Di antara 16 Jun 2005 dan 15 Julai 2005 defendan pertama mengadakan satu pertandingan yang dikenali sebagai 'X-treme Challenge (Round II) Contest' ('pertandingan'). Pertandingan terbuka kepada semua wakil penjual prabayar defendan pertama dan plaintif telah mengambil bahagian dalam pertandingan tersebut. Berhubungan dengan pertandingan, defendan pertama telah mengeluarkan satu risalah kepada kesemua wakil penjual prabayarnya termasuk plaintif yang menggariskan peraturan-peraturan pertandingan. Melalui surat yang bertarikh 21 November 2005 defendan kedua bagi pihak defendan pertama telah menulis kepada plaintif menyatakan bahawa terdapatnya ketaknormalan yang melibatkan stok yang mana syarikat plaintif telah membeli daripada pengedar yang diberi kuasa. Sesalinan surat tersebut telah dihantar kepada Ketua Pegawai Operasi dan Pengurus Besar Kawasan, Bahagian Timur (di mana plaintif beroperasi) defendan pertama. Melalui surat lain yang bertarikh 27 Disember 2005, defendan kedua bagi pihak defendan pertama

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sekali lagi telah menulis kepada plaintif bahawa plaintif telah melanggar peraturan-peraturan pertandingan. Plaintif telah menuntut terhadap defendan gantirugi bagi fitnah dan kemungkiran kontrak. Dalam pernyataan tuntutan, plaintif hanya mengeluarkan semula kandungan surat-surat tanpa memplidkan secara betul butiran-butiran yang didakwa surat-surat fitnah. Defendan-defendan telah memfailkan satu permohonan untuk membatalkan tuntutan plaintif tersebut menurut A 18 k 19(1)(a) dan/atau (b) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau menurut bidang kuasa sedia ada mahkamah. Permohonan adalah berdasarkan alasan bahawa antara lainnya; (1) plaintif tidak memplidkan butiran-butiran dokumen-dokumen yang dikatakan fitnah; (2) tidak terdapatnya penerbitan dalam undang-undang dan sesungguhnya petikan yang diplidkan oleh plaintif daripada dua surat bertarikh 21 November 2005 dan 27 Disember 2005 ('surat-surat') yang mana surat-surat adalah dikeluarkan oleh defendan kedua bagi pihak defendan pertama dan hanya dihantar kepada plaintif; (3) surat-surat telah dikeluarkan oleh defendan kedua untuk dan bagi pihak defendan pertama di dalam skop kuasa yang biasa defendan kedua dan/atau di dalam keadaan biasa perniagaan defendan pertama; dan (4) walaupun tuntutan bagi gantirugi untuk dakwaan kemungkiran kontrak telah dipohon oleh plaintif, plaintif telah gagal untuk menyatakan mana-mana fakta atau asas lain untuk relif tersebut. Timbalan pendaftar yang bijaksana telah menolak permohonan defendan, dan maka rayuan ini. Peguam plaintif yang bijaksana menghujahkan bahawa ini bukan kes yang sesuai untuk berurusan dengan A 18 k 19, mendakwa antara lain bahawa penerbitan tersebut sebenarnya telah dibuat kepada pihak ketiga, iaitu seorang Abdul Ghani bin Abdul Razak yang mana telah menghadiri taklimat berkenaan dengan pertandingan bagi pihak plaintif pada 15 Jun 2005.

Diputuskan, membenarkan rayuan dengan kos:

Tidak dinafikan bahawa surat yang bertarikh 21 November 2005 telah dihantar kepada plaintif dan jelas ianya tidak bolah dikatakan bahawa terdapatnya penerbitan kepada pihak ketiga. Tiada keraguan juga bahawa defendan-defendan juga dilindungi oleh perlindungan bersyarat sebagai Ketua Pegawai Operasi dan Pengurus Kawasan Bahagian Timur defendan pertama mempunyai hak yang sama untuk menerima surat tersebut. Ini telah diperkuatkan dengan fakta bahawa surat penamatan wakil penjual plaintif seterusnya telah ditandatangani oleh Ketua Pegawai Operasi defendan pertama. Berkenaan dengan fitnah, tuntutan plaintif terhadap defendan adalah remeh, menyusahkan dan menyalahgunakan proses mahkamah. Selanjutnya, plaintif tidak menyatakan apa-apa fakta yang menjadi asas dakwaan kemungkiran kontrak (lihat perenggan 14).]

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Notes

For cases on statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5522–5557.

For cases on qualified privilege, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 576–590.

Cases referred to

Reynolds v Times Newspapers Ltd & Ors [1999] 3 WLR 1010 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)

Zulhasmi Zakaria (Sahlan & Associates) for the plaintiff.
S Nanthabalan (Norliza Rasool Khan with him) (Zul Rafique & Partners) for the defendants.

Tengku Maimun J:

[1] The plaintiff's claim against the defendant is for damages for defamation and breach of contract and the relevant paragraphs of the statement of claims read:

(1) Plaintif adalah seorang individu yang berniaga atas nama Airtime Telecommunication, No Pendaftaran KT0177245-U, beralamat di No 51, Tanjung Chat, Jalan Pengkalan Chepa, 15400 Kota Bharu, Kelantan. Plaintif merupakan pengedar utama (Key Dealer) kad prabayar untuk defendan pertama.

(2) Defendan pertama adalah sebuah Syarikat Berhad yang ditubuhkan di Malaysia di bawah Akta Syarikat 1965 dan beralamat berdaftar di Level 15, Menara Celcom, 82, Jalan Raja Muda Abdul Aziz, 50300 Kuala Lumpur.

(3) Defendan kedua adalah seorang individu dan merupakan seorang kakitangan defendan pertama dan berjawatan sebagai Ketua Jualan Runcit (Head of Retail Sales) dan pada setiap masa yang material merupakan penulis surat-surat tersebut.

(4) Di muka surat pertama dan kedua dalam kedua-dua surat tersebut telah dikeluarkan yang mengandungi perkataan-perkataan berunsur fitnah berkenaan plaintif dan/atau berkenaan perniagaan plaintif dan/atau difahamkan dan/atau mampu difahamkan merujuk kepada plaintif seperti berikut:

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BUTIR-BUTIR PERKATAAN BERUNSUR FITNAH

(a) Plaintif dan perniagaan yang dijalankannya adalah pengedar kad prabayar bagi defendan pertama;

(b) Ada perkara-perkara tidak normal berlaku terhadap stok yang dikendalikan oleh perniagaan plaintif. (Surat bertarikh 21 November 2005);

(c) Telefon mudah alih bernombor 013-9007262 mempunyai siri-siri perbuatan perpindahan 'airtime' dari nombor prabayar 013 yang lain melibatkan nilai RM25 bagi setiap transaksi. (Surat bertarikh 21 November 2005);

(d) Kami dapati nombor telefon mudah alih 013-9002327 juga menunjukkan perbuatan perpindahan 'airtime' yang sama. (Surat bertarikh 21 November 2005);

(e) Semua '*starter packs*' didapati adalah stok yang dibeli oleh perniagaan plaintif dan pengedar sah defendan pertama. Keadaan itu menunjukkan perniagaan plaintif terlibat dengan cara perniagaan yang tidak betul/diingini (*undesired business conduct*) yang boleh menjejaskan reputasi Celcom (defendan pertama), keyakinan pelanggan-pelanggan dan perniagaan Celcom yang lebih luas;

(f) Dukacita dimaklumkan bahawa tindakan berikut dikenakan ke atas perniagaan tuan:

(1) Semua akaun yang diaktifkan dalam tempoh program tetapi didapati melakukan perpindahan '*airtime*' secara salah tidak layak dikira sebagai sebahagian daripada keseluruhan prestasi anda. (Surat bertarikh 21 November 2005);

(g) Kami menganggap perkara ini sangat serius dan dengan tegas meminta perniagaan tuan menghentikan perbuatan-perbuatan tersebut. Kami harap tuan-tuan menganggap ini sebagai amaran keras dan kegagalan berbuat demikian akan menyebabkan Celcom mengambil tindakan selanjutnya. (Surat bertarikh 21 November 2005);

(h) Para pemenang yang diumumkan pada 3 Oktober di Sheraton Imperial Hotel adalah pemenang-pemenang yang telah disahkan kelayakannya. Kami tidak mengumumkan pemenang-pemenang lain kerana kami mendapati unsur-unsur penyalahgunaan perkhidmatan '*Airtime Transfer*'. Sila rujuk surat kami bertarikh 21 November 2005, bertajuk '*CELCOM Xpac – Unethical Business Conduct*'. (Surat bertarikh 27 Disember 2005);

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(i) Seterusnya kami telah menjalankan semakan terperinci ke atas semua pek permulaan Xpac pembelian syarikat tuan yang diaktifkan sepanjang tempoh promosi dan didapati sejumlah 5,905 akaun telah terlibat dengan penyalahgunaan perkhidmatan '*Airtime Transfer*'. (Surat bertarikh 27 Disember 2005);

(j) Seperti yang telah kami jelaskan di empat persidangan '*Prepaid Key Dealers*' yang berasingan iaitu pada 15 Jun 2005 ('The Prince Hotel'), 15 Julai 2005 ('PNB Darby Park'), 30 Ogos 2005 ('Istana Hotel'), dan 3 Oktober 2005 ('Sheraton Imperial Hotel'), kami telah memberi amaran keras bahawa sekiranya didapati penyalahgunaan '*Airtime Transfer*' tindakan tegas akan diambil. (Surat bertarikh 27 Disember 2005);

(k) Aktiviti sedemikian telah menjurus kepada kegiatan-kegiatan tidak beretika yang telah memudaratkan reputasi Celcom, keyakinan pelanggan dan pasaran keseluruhannya. (Surat bertarikh 27 Disember 2005);

(l) Oleh yang demikian berdasarkan terma dan syarat yang ditetapkan oleh Celcom, penyalahgunaan 'Air Time Transfer' yang dijalankan oleh syarikat tuan dianggap sebagai satu kesalahan. (Surat bertarikh 27 Disember 2005.) Melalui risalah bercetak 'Xpac Prepaid Ativation Incentive Program' telah dinyatakan di bawah Terma & Syarat No 7 'Celcom has the sole right to accept or reject any starter packs deemed to be non eligible under this program' yang bermaksud Celcom berhak untuk menerima atau menolak segala pek permulaan yang didapati tidak menepati kelayakan di bawah program ini. (Surat bertarikh 27 Disember 2005);

(m) Keputusan yang telah dilaksanakan adalah keputusan muktamad bersama yang telah dipersetujui oleh ahli jawatankuasa terlibat dan pihak pengurusan. Segala keputusan adalah berdasarkan fakta-fakta yang nyata. (Surat bertarikh 27 Disember 2005);

(n) Setiap program yang kami tawarkan mestilah melalui proses-proses yang tertentu berdasarkan keputusan daripada laporan Bahagian Teknologi Maklumat ('IT') dan diaudit oleh Bahagian Kewangan. (Surat bertarikh 27 Disember 2005);

(o) Di dalam pertandingan *Xtreme Challenge Round II*, jumlah pengaktifan syarikat tuan yang layak adalah 4,176 dan ini meletakkan syarikat tuan di tempat kedua di peringkat Kawasan Timur untuk meraih hadiah berjumlah RM22,888. Ini adalah keputusan setelah diambil kira aktiviti-aktiviti penyalahgunaan

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'*Airtime Transfer*' seperti yang telah dinyatakan di dalam surat-surat kami yang bertarikh 21 November 2005 dan 29 November 2005. Seterusnya ini juga bermakna tiada pemenang untuk kategori '*Grand*' dan pertama di Kawasan Timur. (Surat bertarikh 27 Disember 2005).

Begitu juga, bagi peringkat Nasional secara keseluruhan tiada pemenang yang layak bagi tempat Pertama, Kedua dan Ketiga:

(p) Sementara itu, pengumuman syarikat tuan sebagai penyandang No 1 '*Top Ten Prepaid Key Dealers Qtr 3 2005*' di Legend Hotel bertarikh 21 November 2005 adalah khususnya berdasarkan prestasi jualan dari bulan Julai 2005 hingga September 2005. (Surat bertarikh 27 Disember 2005)

(q) Dengan penjelasan di atas, ingin kami tegaskan bahawa pihak Celcom telah mengambil kira segala fakta di dalam menentukan keputusan bagi '*Celcom Xtreme Challenge Round II*.' (Surat bertarikh 27 Disember 2005).

(6) Perkataan berunsur fitnah dalam ertikata dan maksud semulajadi serta biasanya bermaksud dan mampu difahamkan bermaksud bahawa:

(a) Plaintif dan perniagaannya telah tidak berurus niaga dengan cara betul dan malah meragukan;

(b) Plaintif seorang yang tidak beretika dan menjalankan perniagaan secara salah dan menjejaskan orang ramai;

(c) Plaintif melakukan perbuatan manipulasi '*Airtime*' untuk motif mengaut untung secara tidak beretika;

(d) Plaintif melakukan penipuan dengan membuat pindahan '*Airtime*';

(e) Stok kit permulaan (*starter pack*) yang diurusniaga oleh plaintif mencurigakan dan disangsikan;

(f) Plaintif adalah pengedar yang tidak boleh dipercayai dan tidak amanah;

(g) Plaintif adalah punca kepada ketidakyakinan pelanggan Celcom dan perosak reputasi Celcom;

(9) Pada setiap masa yang material atau lebih kurang pada bulan November dan Disember 2005 defendan kedua dalam menjalankan urusan sebagai pegawai defendan pertama dan/atau bagi pihak defendan pertama telah menghantarkan, mengeluarkan dan atau menyebabkan dihantar surat-surat tersebut.

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(10) Disebabkan oleh pengeluaran, pengedaran dan pendedahan surat-surat tersebut mengakibatkan reputasi serta nama baik plaintif telah tercemar, terhina dan rosak teruk serta dimalukan.

(11) Plaintif menegaskan disebabkan oleh pengeluaran, pengedaran dan pendedahan surat-surat defendan-defendan pertama, kedua mendapat habuan keuntungan atau pendapatan berapa wang ringgit.

(13) Maka plaintif menuntut penghakiman terhadap defendan-defendan pertama dan kedua untuk:

(a) Pampasan gantirugi am sebanyak RM15,000,000 atas perbuatan tort, libel dan pelanggaran kontrak defendan pertama dan kedua terkandung di dalam surat-surat yang tidak benar dan memfitnah plaintif bertarikh 21 November 2005 dan 27 Disember 2005 dan seterusnya dikeluarkan dan diedarkan semula oleh defendan-defendan pertama dan kedua kepada pihak-pihak tertentu;

(b) Pampasan gantirugi dan (*exemplary damages*) dan gantirugi teruk sebanyak RM15,000,000 atas perbuatan tort libel yang terkandung di dalam surat-surat defendan pertama dan kedua;

(c) Tambahan secara alternatif gantirugi am, gantirugi teladan dan gantirugi teruk atas perbuatan kepalsuan, tidak benar dan niat jahat oleh defendan-defendan pertama dan kedua dengan mengeluarkan dan mengedarkan surat-surat tidak benar memfitnah plaintif bertarikh 21 November 2005 dan 27 Disember 2005 dan seterusnya dikeluarkan dan diedarkan semula oleh defendan-defendan pertama dan kedua;

(d) Perintah injunksi untuk melarang, menghalang dan menyekat defendan-defendan dan/atau pekerja-pekerja dan/atau ejen-ejen dan/atau wakil-wakil defendan-defendan dalam apa cara jua atau bentuk daripada mengeluarkan dan/atau mengedar dan/atau menyebabkan atau dikeluar atau diedar surat-surat atau bahan tidak benar dan memfitnah plaintif dan/atau perkataan yang seumpamanya yang berunsur fitnah terhadap plaintif;

(e) Faedah dari tarikh penghakiman sehingga penyelesaian penuh;

(f) Kos tindakan ini; dan

(g) Relif-relif lain yang difikirkan wajar dan adil oleh mahkamah Yang Mulia.

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[2] What could be seen from the above is that the plaintiff merely reproduced the contents of the letters without properly pleading the particulars of the alleged defamatory letters.

[3] Vide encl 6 the defendants filed an application to strike out the plaintiff's claim pursuant to O 18 r 19(1)(a) and/or (b) and/or (d) of the Rules of the High Court 1980 and/or pursuant to the inherent jurisdiction. The application is premised, inter alia, on the ground that:

(1) The plaintiff has not pleaded the particulars of the documents that are purportedly defamatory;

(2) There is no publication in law and in fact of the excerpts pleaded by the plaintiff from the two letters dated 21 November 2005 and 27 December 2005 ('letters') as the said letters were issued by the second defendant on behalf of the first defendant and sent only to the plaintiff;

(3) The said letters were issued by the second defendant for and on behalf of the first defendant within the scope of the second defendant's usual authority and/or in the ordinary course of the first defendant's business;

(4) Further, although a claim for damages for alleged breach of contract has been prayed for by the plaintiff, the plaintiff has failed to set out any factual or other basis for the said relief.

The learned deputy registrar dismissed the defendant's application, hence this appeal vide encl 11.

[4] The plaintiff ('trading as Airtime Telecommunication') was a dealer of the first defendant's pre-paid cards and starter packs. Between 16 June 2005 and 15 July 2005 the first defendant organised a contest known as 'X-treme Challenge (Round II) Contest ('contest'). The contest was designed to increase and/or encourage the number of prepaid starter pack activations produced by the first defendant for mobile phones during the period of the contest.

[5] The contest was open to all of the first defendant's prepaid dealers and the plaintiff had taken part in the contest. In relation to the contest, the first defendant had issued a pamphlet to all its prepaid dealers including the plaintiff setting out the rules of the contest, inter alia, as follows:

(i) Only one winner will be declared for each prize tier for the Regional High Achievers Prizes Category and the National Grand Prizes Category respectively;

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(ii) In the event there are no qualifiers for any of the tiers, no winners will be announced for the relevant tier;

(iii) The first defendant has the sole right to accept or reject any starter pack deemed to be non-eligible under this program.

[6] Prior to the contest on 15 June 2005 the first defendant held a briefing session for its dealers. One Abdul Ghani Abdul Razak attended on behalf of the plaintiff during which briefing the first defendant reminded the dealers of the various express and implied terms of the contest including and in particular that pre-sale activation of prepaid starter packs involving airtime transfers were prohibited and would not be taken into account in determining the winners of the contest.

[7] Further, by a fax dated 21 June 2005 to all its dealers, the first defendant warned that dealers should not pre-activate the prepaid starter packs and that such activity was deemed 'unacceptable business conduct' which may result in a termination of the perpetrator's dealership.

[8] The initial results for the contest showed that the plaintiff had among the top pack activations but on investigation by the first defendant, it was discovered that the plaintiff had participated in pre-sale activation or prepaid starter packs involving improper airtime transfers. Vide a letter dated 21 November 2005 the second defendant on behalf of the first defendant wrote to the plaintiff, the relevant parts read:

> Based on an initial investigation, we have found that there are some abnormalities which involve the stock that your company purchased from our authorized distributors.
>
> Our record shows that the mobile no. 013-9007262 has a series of airtime transfer transactions form other 013 prepaid accounts involving RM25 per transaction. Below is an extract from the report:
>
> ...
>
> We also found that another mobile no. 013-9002327 shows similar airtime transfer transaction. Below is an extract from the report:
>
> ...
>
> All of these starter packs were found to be part of the stock purchased by your company from our authorized distributor. The above circumstances lead to indicate that your company has engaged in an undesired business conduct that could be detrimental to Celcom's reputation, our customers' confidence and the trade at large.
>
> We regret to advise therefore that the following action shall be imposed on your company:

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(1) All accounts that were activated during this program period BUT were found to have done inappropriate airtime transfer shall NOT be eligible as part of your total performance count.

We view this matter very seriously, and strongly urge your company to put an immediate stop to such activities. We hope that you take this as a stern warning, failing which, CELCOM would have to consider further actions.

We strictly would like to remind you that as our Prepaid Key Dealer, your company is bound to the terms and conditions that Celcom has set to all our business partners.

[9] The above letter was copied to the Chief Operating Officer and the Regional General Manager, Eastern Region (where the plaintiff was based) of the first defendant.

[10] By another letter dated 27 December 2005 the second defendant on behalf of the first defendant wrote to the plaintiff as follows:

Terima kasih di atas surat tuan bertarikh 6hb Disember 2005, susulan daripada surat kami bertarikh 21hb dan 29hb November 2005 (seperti lampiran).

Kami amat prihatin di atas kandungan surat tersebut dan sehubungan dengan itu, pihak Ibupejabat Celcom bersama-sama Pejabat Kawasan Timur Celcom telah membuat penelitian dan berikut adalah penjelasan kami:

(1) Para pemenang yang diumumkan pada 3 Oktober di Sheraton Imperial Hotel adalah pemenang-pemenang yang telah disahkan kelayakannya. Kami tidak mengumumkan pemenang-pemenang lain kerana kami mendapati unsur-unsur penyalahgunaan perkhidmatan 'Airtime Transfer'. Sila rujuk surat kami bertarikh 21 November 2005, bertajuk 'CELCOM Xpax – Unethical Business Conduct.

(2) Seterusnya, kami telah menjalankan semakan terperinci ke atas semua pek permulaan Xpax pembelian syarikat tuan yang diaktifkan sepanjang tempoh promosi dan didapati sejumlah *5,905* akaun telah terlibat dengan penyalahgunaan perkhidmatan 'Airtime Transfer'.

(3) Seperti yang telah kami jelaskan di empat persidangan 'Prepaid Key Dealers' yang berasingan iaitu pada 15hb Jun 2005 (The Prince Hotel), 15hb Julai 2005 (PNB Darby Park), 30hb Ogos 2005 (Istana Hotel), dan 3hb Oktober 2005 (Sheraton Imperial Hotel), kami telah memberi amaran keras bahawa sekiranya didapati penyalahgunaan 'Airtime Transfer', tindakan tegas akan diambil.

Aktiviti sedemikian telah menjurus kepada kegiatan-kegiatan tidak beretika yang telah memudaratkan reputasi Celcom, keyakinan pelanggan dan pasaran keseluruhannya.

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(4) Oleh yang demikian berdasarkan terma dan syarat yang ditetapkan oleh Celcom, penyalahgunaan 'Air Time Transfer' yang dijalankan oleh syarikat tuan telah dianggap sebagai satu kesalahan.

Melalui risalah bercetak 'Xpax Prepaid Activation Incentive Program', telah dinyatakan di bawah Terma & Syarat No 7. '*Celcom has the sole right to accept or reject any starter packs deemed to be non eligible under this program*' yang bermaksud Celcom berhak untuk menerima atau menolak segala pek permulaan yang didapati tidak menepati kelayakan di bawah Program ini.

(5) Keputusan yang telah dilaksanakan adalah keputusan muktamad bersama yang telah dipersetujui oleh ahli jawatankuasa terlibat dan pihak Pengurusan. Segala keputusan adalah berdasarkan fakta-fakta yang nyata.

(6) Setiap program yang kami tawarkan mestilah melalui proses-proses yang tertentu berdasarkan keputusan daripada laporan Bahagian Teknologi Maklumat (IT) dan diaudit oleh Bahagian Kewangan.

(7) Di dalam Pertandingan Xtreme Challenge Round II, jumlah pengaktifan syarikat tuan yang layak adalah *4,176* dan ini meletakkan syarikat tuan di tempat Kedua di peringkat Kawasan Timur untuk meraih hadiah berjumlah *RM22,888*. Ini adalah keputusan setelah diambil kira aktiviti-aktiviti penyalahgunaan 'Airtime Transfer' seperti yang telah dinyatakan di dalam surat-surat kami yang bertarikh 21 November 2005 dan 29 November 2005. Seterusnya, ini juga bermakna tiada pemenang untuk kategori 'Grand' dan Pertama di Kawasan Timur.

Begitu juga, bagi peringkat nasional secara keseluruhan tiada pemenang yang layak bagi tempat pertama, kedua dan ketiga.

(8) Sementara itu, pengumuman syarikat tuan sebagai penyandang No 1 'Top Ten Prepaid Key Dealers Qtr 3 2005' di Legend Hotel bertarikh 21 November 2005 adalah khususnya berdasarkan prestasi jualan dari bulan Julai 2005 hingga September 2005.

Dengan penjelasan di atas, ingin kami tegaskan bahawa pihak Celcom telah mengambil kira segala fakta di dalam menentukan keputusan bagi 'Celcom Xtreme Challenge Round II'.

[11] The plaintiff alleged that the letters from the defendants dated 21 November 2005 and 27 December 2005 ('letters') are defamatory of the plaintiff.

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[12] Learned counsel for the defendant in his written submission argued, inter alia, that the plaintiff's claim discloses no reasonable cause of action as the particulars of the documents that are purportedly defamatory are not pleaded. Further learned counsel argued that there is no publication of the said letters as the said letters were merely copied to the officers of the first defendant who had a corresponding interest or duty to be informed of the said letters. Learned counsel therefore contended that the defendants are protected by the defence of qualified privilege. In support thereof learned counsel cited the case of *Reynolds v Times Newspapers Ltd & Ors* [1999] 3 WLR 1010 wherein at p 1050 Lord Hope of Craighead said:

> At the heart of the matter is the question whether 'the occasion' is privileged. This occurs where the person who makes the communication has an interest or duty to make it to the person to whom it was made, and the person to whom it is made has a corresponding interest or duty to receive it.

[13] Learned counsel for the plaintiff in submitting that this is not a proper case to be dealt with under O 18 r 19 argued, inter alia, that publication had in fact been made to a third party ie one Abdul Ghani bin Abdul Razak. It is important to note that this fact has not been pleaded by the plaintiff and hence I do not think it is open for the learned counsel to submit on the alleged publication to Abdul Ghani bin Abdul Razak. In any event Abdul Ghani had attended a briefing on behalf of the plaintiff on 15 June 2005 and the letter dated 21 November 2005 was addressed as folows:

> En Abdul Ghani Abdul Razak
>
> Airtime Telecommunications
>
> LOT 1499-A, JALAN LONG YUNUS
>
> 15200 KOTA BHARU
>
> KELANTAN

[14] Undeniably this letter was sent to the plaintiff and clearly it could not be said that there has been publication to third party. There is also no doubt that based on *Reynolds*, the defendants are protected by qualified privilege as the Chief Operating Officer and the Regional Manager of the Eastern Region of the first defendant has a corresponding interest to receive the letter. This is fortified by the fact that the subsequent letter of termination of the plaintiff's dealership was signed by the Chief Operating Officer of the first defendant. In respect of defamation I am therefore of the view that the plaintiff's claim against the defendant is frivolous, vexatious and an abuse of the process of the court. Further, I am in agreement with learned counsel for the defendant that the plaintiff had not set out any facts which form the basis of the alleged

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breach of contract. The defendant's appeal in encl 11 was therefore allowed with costs and the claim was consequently struck out.

Appeal allowed with costs.

Reported by Loo Lai Mee